1949

The State Insurance Fund v. Elbert I. Lunnen and The Industrial Commission of Utah : Brief of Plaintiff

Utah Supreme Court

F. A. Trottier; Attorney for Plaintiff;

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

THE STATE INSURANCE FUND, administered by the Commission of Finance of Utah,

Petitioner and Plaintiff,

vs.

ELBERT I. LUNNEN and THE INDUSTRIAL COMMISSION OF UTAH,

Defendants.

No. 7274

PLAINTIFF'S BRIEF

F. A. TROTTIER,
Attorney for Plaintiff.

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STATEMENT

Elbert I. Lunnen worked as a blacksmith and welder for Lundin & May Foundry and Machine Company in Salt Lake City, Utah, for a period of 22 years, from January, 1926, to February 7, 1948. During most of that time he was exposed to the smoke and fumes which came

from the fluxes and welding rods which were used in the welding processes. During the last 5 or 6 years of his work he noticed a difficulty in breathing, and he mentioned it several times to his employer. He found it necessary to lay off work for short periods of time, particularly after he had been welding on bronze. Finally his condition become so bad that he could not work any longer; so he quit working on February 8, 1948, and has not been able to work since that date.

On August 5, 1948, Mr. Lunnen filed a written application for compensation with the Industrial Commission in which he specified that he had received injuries by inhaling the fumes, smoke and gases from the fluxes and welding rods and the coke used in the forge. This application was made on a form which the Industrial Commission uses in accidental injury cases; so Mr. Lunnen later filed his claim with the Industrial Commission on September 18, 1948, on an occupational disease claim form.

The Industrial Commission held a hearing on October 6, 1948, and rendered its decision on November 8, 1948, awarding compensation benefits to Mr. Lunnen under the Occupational Disease Law. The State Insurance Fund, the employer's workmen's compensation and occupational disease insurance carrier, filed a timely application for rehearing, which the Industrial Commission denied on November 18, 1948. The State Insurance Fund, which is administered by the Commission of Finance, has brought the case to the Supreme Court of

Utah for review. In this brief we shall refer to the reporter's transcript of the evidence as Tr.

QUESTION FOR REVIEW

The question of most importance in this case is whether Mr. Lunnen filed his written application with the Industrial Commission within the required time specified in the Occupational Disease Law.

ARGUMENT

We shall assume, for the purpose of this discussion, that Mr. Lunnen established by competent evidence that he became totally disabled as the result of several years' exposure to poisonous and irritating smoke and fumes in his work at the Lundin & May plant.

POINT 1

MR. LUNNEN'S APPLICATION FOR COMPENSATION WAS NOT FILED WITH THE INDUSTRIAL COMMISSION WITHIN THE REQUIRED PERIOD OF TIME AND WAS THEREFORE LEGALLY BARRED.

Section 42-1a-49 of the Occupational Disease Law provides:

> The right to compensation under this act for disability or death from an occupational disease shall be forever barred unless written claim is filed with the commission within the time as in this section hereinafter provided:

(a) If the claim is made by an employee and based upon silicosis it must be filed within one year after the cause of action arises.

(b) If the claim is made by an employee and based upon a disease other than silicosis it must be filed within sixty days after the cause of action arises, except in case of benzol or its derivities when it must be filed within ninety days.

(c) (This subsection relates to death cases.)

Mr. Lunnen's claim, after it was amended by his attorney, (Tr. 2 & 3), was undisputably based upon an occupational disease other than silicosis, and therefore comes within the provisions of the statutory limitation of subsection (b) above-quoted. The disputed point in this case involves the question, "When does a cause of action arise in an occupational disease case?"

We might be willing to concede that Mr. Lunnen's first application of August 5, 1948, should be considered a proper written claim filed with the Industrial Commission, even though it was on a different form than is customarily used in occupational disease cases. But that would not help him any. August 5, 1948, is almost six months after the day Mr. Lunnen's total disability commenced on February 8, 1948. He was required to file his claim within 60 days after his cause of action arose.

Among other things, the Industrial Commission's decision contained the following findings:

* * * *

"he was exposed during this period to harmful quantities of poisonous fumes containing phosphorus, manganese, chloride and chrome; that on February 8, 1948, he quit his job because he was physically unable to work; that he consulted doctors Bauerline and Hatch who advised him to quit work and go to Arizona; that no complete diagnosis was made at this time to the applicant; that the applicant became dissatisfied with the progress made in his recovery and on July 9, 1948, went to see Dr. Vernon Stevenson. Following a complete physical examination of the applicant and the x-rays taken of the applicant, Dr. Stevenson found on July 28, 1948, that the applicant was totally disabled as a result of exposure to poisonous fumes arising out of or in the course of his employment; that the cause of action in this case arose on July 28, 1948, when a complete diagnosis was made by Dr. Vernon Stevenson of this case and a finding was made; that applicant was physically unable to continue his work because of this occupational disease he had incurred due to his exposure to poison fumes during his employment from January, 1926, to February, 1948, by Lundin and May Foundry and Machine Company; that the applicant filed a claim for compensation with the Industrial Commission on September 18, 1948, and is within the statute of limitations for filing his claim."

The Commission's finding, or conclusion, that Mr. Lunnen's cause of action arose on July 28, 1948, was the basic error in the Commission's decision.

It is our contention that Mr. Lunnen's cause of action arose on February 8, 1948, the date when he became totally disabled, and since which date he has been continuously totally disabled.

No occupational disease case has ever come to the Supreme Court of Utah prior to this, in which was involved a question relating to when the cause of action arose, so far as we are aware. Neither have we been able to find any occupational disease case from any other state which involved the exact wording of the Statute of Limitations contained in Section 49 of the Utah Occupational Disease Disability Law.

When this matter was pending before the Industrial Commission a Memorandum of Authorities was submitted by Mr. Lunnen's attorney at that time. He likewise apparently was unable to find any case which involved a Statute of Limitations containing the same wording as that found in our Occupational Disease Law.

What are the necessary elements which give an employee a "cause of action" under the Utah Occupational Disease Daw? They are enumerated in Section 42-1a-13, as follows:

> (a) There is imposed upon every employer a liability for the payment of compensation to every employee who becomes totally disabled by reason of an occupational disease subject to the following conditions:
>
> (1) No compensation shall be paid when the last day of injurious exposure of the employee to the hazards of said occupational diseases shall have occurred prior to the effective date of this act.
>
> (2) No compensation shall be paid for a disease other than silicosis unless total disability

results within one hundred twenty days from the last day upon which the employee actually worked for the employer against whom compensation is claimed.

(3) (This subsection relates to silicosis which is not here involved.)

(4) No claim shall be maintained nor compensation paid unless the claim has been filed with the commission in writing within the time fixed by the appropriate subdivision of Section 49 of this act.

(The rest of the Section relates to death cases.)

Applying all these provisions to Mr. Lunnen's claim:

First, he must have had exposure to harmful substances in the work done for his employer in the period between July 1, 1941, and February 7, 1948.

Next, he must have become totally disabled as the result of that exposure and such total disability must have commenced within 120 days after February 7, 1948, which was the last day of such exposure. In other words, his total disability must have commenced on or before June 6, 1948.

Next, he must have filed his written claim with the Industrial Commission within 60 days after his cause of action arose.

With respect to the exposure, the evidence in the record is ample to satisfy that requirement. With respect to the time when his total disability commenced, we have already stated that the record shows Mr. Lunnen became totallly disabled February 8, 1948. Inasmuch as

his attorney has filed an Answer to our Petition for Writ of Certiorari, in which Answer he alleges that the record does not establish whether Mr. Lunnen was totally disabled on February 8, 1948, or at some later date, we shall quote a few portions of the testimony given by Mr. Lunnen, himself. In both of his applications Mr. Lunnen stated that he left work on February 8, 1948, and that he continued to be totally disabled from that day until the date he filed each application. Then in his testimony (Tr. 9 & 10) he stated that the smoke and fumes which were given off during welding operations were so unpleasant and irritating that he was unable to stay with it for more than half an hour at a time and that he had complained to his employer about this condition several times during the 4 or 5 years previous to his quitting work. At Tr. 10 he testified as follows:

> Q. What brought you to make that complaint?
>
> A. Well, on a particular bronze job, I had to do an acetylene bronze job, and I told the boss at the time that it was getting too much for me.
>
> Q. Was there anything in your physical condition that made you arrive at that conclusion?
>
> A. Just your lungs, you get so you can taste it in your food at night.
>
> Q. That was about four or five years ago you made that complaint?
>
> A. Yes.
>
> Q. I will ask you whether you have noticed any difficulty in breathing, and whether you did at that time.
>
> A. This was coming on for five or six years, difficulty in breathing.

Q. When you noticed this difficulty in breathing, you complained to your employer?

A. I have told them time and again.

Q. I will ask you whether or not in the last few years it has been necessary for you to lay off work for short periods of time?

A. Yes.

Q. What period?

A. Every time I would weld on bronze I would have to lay off three to eight days.

He further testified that after he quit working February 8, 1948, he consulted Drs. Bauerline and Hatch, who told him to quit his work and go to Arizona. He then went to the office of the Industrial Commission where he was supplied with certain forms, one set of them yellow and the other set white. (Tr. 11, 12, 29 & 30.) He took the yellow forms to the office of Drs. Bauerline and Hatch, but kept the white forms at his home. Apparently the white forms were the blanks upon which he could have made his claim to the Industrial Commission, although that was not clearly brought out in the hearing. On the back of the form filed by him on September 18, 1948, he stated "I was forced to quit work on February 8, 1948, because of my illness." He also testified, (Tr. 29):

Q. You say you went to Doctors Hatch and Bauerline in February, 1948?

A. Yes.

Q. What was the purpose of going there?

A. To find out about my lungs.

Q. They were giving you trouble at that time?

A. Yes, that is the reason I quit work altogether.

Q. The condition of your lungs made is necessary for you to quit work February 8, 1948?

A. Yes.

and at (Tr. 30):

A. In there they handed me two different papers, and I took one set of papers home.

Q. What did it say on them?

A. I don't know. I took the three yellow ones up to the clinic but they never filled them out.

MR. RAMPTON: That was to Dr. Bauerline?

A. Yes.

Q. Did Doctor Bauerline tell you why?

A. He told me that I had to stay out of that.

Q. You were aware at that time that your disability was probably caused by your employment?

A. Yes, I had known it for a long while.

* * * *

Q. What did Dr. Bauerline tell you was the cause of it?

A. Dr. Bauerline said it was caused over a period of years and the condition of the place where I worked.

In Mr. Lunnen's attorney's Memorandum filed with the Industrial Commission, he argued that the 60-day Statute of Limitations should not commence to run in this case until Mr. Lunnen was informed by Dr. Stevenson on July 28, 1948, that his disability was caused from injury to his lungs and diaphram, which Dr. Corey's x-ray and Dr. Stevenson's diagnosis determined were the results of inhalation of gases from the welding

operations containing phosphorus, manganese, chloride and chrome. The Industrial Commission apparently accepted that theory as the basis for its finding and conclusion that Mr. Lunnen's cause of action arose within the required statutory period prior to the time he filed his claim. The Industrial Commission's decision, however, did not explain the date upon which Mr. Lunnen's cause of action arose. The evidence we have quoted clearly showed that he knew that the gases and fumes and smoke from the welding operations at his employer's plant were causing him to have lung difficulty and other physical troubles for several years prior to the date when he finally quit work; and he also knew that these lung troubles and other physical difficulties were the cause of his inability to further continue his work.

On the general subject of when does a cause of action arise, we briefly quote the following:

> 34 *American Jurisprudence,* p. 92, §113:
>
> It may be stated as a sound general proposition that a cause of action accrues the moment the right to commence an action comes into existence, and the statute of limitations commences to run from that time even though, in some jurisdictions, the party is ignorant as to the existence of his rights or the cause of action is fraudulently concealed. As the rule is otherwise expressed, a right of action accrues whenever such a breach of duty or contract has occurred, or such a wrong has been sustained, as will give a right to bring and sustain a suit. Conversely, the right to commence an action arises the moment the cause of action accrues. In the absence of a statute to the con-

trary, the test in each case is whether the party asserting a claim is entitled to maintain an action to enforce it, for no limitation commences to run against any demand until the obligation or demand is due and payable, in the sense that it is defined sufficiently to be capable of enforcement.

(See *Last Chance Ranch Co. vs. Erickson,* 25 Pac. (2nd) 952, 82 Utah 475.)

86 *A. L. R.* 574:

> The decision that the statute begins to run only when the disease culminates in actual disability is also strongly supported by other cases not turning upon that point, but holding, like Johnson's Case (1914) 217 Mass. 388, 104 N. E. 735, 4NCCCA 843, and Bergeron's Case (1923) 243 Mass. 366, 137 N. E. 739, that injury to a workman who had for years been gradually absorbing a poison into his system while working, but did not quit work until it made him so sick that he had to stop, was not received until he finally quit.

54 *Corpus Juris Secundum,* pages 11 & 12, §109:

> A cause or right of action accrues, so as to start the Staute of Limitations running, when the right to institute and maintain a suit arises, and not before.
>
> * * * whenever one person may sue another a cause of action has accrued and the Statute of Limitations begins to run * * *.
>
> The running of the statute, however, is not delayed until plaintiff can secure sufficient evidence to maintain his action.

On February 8, 1948, Mr. Lunnen was entitled to claim occupational disease compensation against his employer and its insurance carrier. Before that date

he did not have any cause of action (right to file a claim), against his employer and its insurance carrier. February 8, 1948, was the first day on which all the necessary elements of an occupational disease case were in existence and upon the basis of which Lunnen could have legally filed a claim. Consequently, February 8, 1948, was the day when his case of action "accrued" or "arose," both of which words mean the same thing insofar as they relate to a cause of action.

While the Workmen's Compensation Law of Utah contains an entirely different Statute of Limitations than that contained in the Occupational Disease Law, (and the Workmen's Compensation Law always did have a differently worded Statute of Limitations than the Occupational Disease Law), there is one case which was decided by the Supreme Court of Utah relating to a workman's compensation claim which contains a statement of basic rules relating to the Statute of Limitations which may be helpful to the Court in its consideration of the case at bar. We refer to *Salt Lake City vs. Industrial Commission,* 74 Pac. (2nd) 657, 93 Utah 510. That case involved a situation which arose prior to the Legislature's enactment of the present three-year Statute of Limitations found in the last sentence of Section 43-1-92 of the Workmen's Compensation Law. We quote from 93 Utah, page 513:

> "The (Workmen's) Compensation Act, Rev. St. 1933, 42-1-1 et seq. imposes a duty on employers to pay compensation to employees who suffer disability from an injury by accident aris-

> ing out of or in the course of the employment. Not until there is an accident and injury and a disability or loss from the injury does the duty to pay arise. A mere accident does not impose the duty to pay. Accident plus injury therefrom does not impose the duty. But accident plus injury which results in disability or loss gives rise to the duty to pay."

It also could appropriately be said that the Occupational Disease Law requires payment of compensation benefits when there has been necessary exposure to the harmful substances, plus injury to the employee resulting from that exposure, plus disability resulting from said injury. With the existence of all three of those elements, the employee becomes entitled to make a claim for occupational disease compensation benefits.

The Utah Occupational Disease Law does not contain any provision relating to the employee using diligence in obtaining a thorough medical diagnosis of his case, or learning the technical medical name of the particular disease which disables him, or obtaining the necessary medical evidence which he migh need to establish his claim. But the Occupational Disease Law does contain an absolute limitation of the time within which he must file his written claim with the Industrial Commission in order for him to be entitled to the benefits provided by the Law.

The case of *Cleveland vs. Laclede Christy Clay Products Company,* 129 S. W. (2nd) 12, which was decided by the Missouri Court of Appeals in 1939, involved

the Statute of Limitations applicable to a claim for disability from silicosis. The Missouri workmen's compensation law covers both accidental injuries and occupational diseases, and in that respect differs from Utah's statutes, in which the occupational disease law is a separate act. However, this case has considerable similarity to the case at bar, even though they involve different occupational diseases. The Missouri Court said:

> "It is claimed by counsel for the claimant that his condition was first discovered on January 7, 1937, following an x-ray examination on January 3, 1937. This was the date his physician informed him of the name of the disease from which he was suffering, to wit: "silicosis." It is urged that this information was the first knowledge he had that he was suffering from an occupational disease, and it is further urged that he, because of learning the name of his lung trouble, filed his claim with the Workmen's Compensation Commission on January 28, 1937. Dr. Weinel, his physician had been treating him for the chest trouble for a long period of time, and what claimant knew prior to January 7, 1937, about his chest trouble was not added to by Dr. Weinel on that date by giving him the specific name of "silicosis" as the disease from which he suffered. The greatest poet has said, "What is in a name? That which we call a rose, by any other name would smell as sweet." It cannot be seriously considered that his chest condition had materially changed immediately upon his knowledge of the name of the disease as gained from his physician. There is nothing in the Workmen's Compensation Law indicating that the six months' statute of limitation does not begin to run until such time

as the employee may be told the technical name of his illness. (Cases cited.) According to his own testimony, claimant knew more than six months prior to the filing of his claim, that he had this trouble in his chest and that he had been treated for it. He knew that the chest trouble was the cause of his inability to do his full work and that the nature of the work aggravated this condition.

* * * *

It is set out in 37 Corpus Juris, p. 969, as follows: "* * * mere ignorance of the facts which constitute the cause of action will not postpone the operation of the statute of limitations, but the statute will run from the time the cause of action first accrues notwithstanding such ignorance."

In the case of *Universal Granite Quarries Co. vs. Ind. Comm.*, 272 N. W. 863, 224 Wis. 680:

"It is quite true the claimant knew nothing about silicosis, but he knew about stone dust and thought that was the cause of his difficulty. He did not understand fully the physiological action of stone dust in 1930 and 1931, he probably does not understand it yet, but he knew that stone dust was causing his trouble and must have known that stone dust was connected with his employment for he had worked for 40 years at the same kind of work. * * * Failing to make claim for compensation within two years from the time when he became aware of his condition and the cause of it, his claim is barred."

In the case of *Brown vs. St. Joseph Lead Co.*, 87 Pac. (2nd) 1000, 60 Idaho 39, the Court's opinion holds

that the accident sustained by a lode mine employee who contracted silicosis was completed when the disease became so bad that the employee was forced to cease working, and the one-year period within which claim for compensation must be filed under the Workmen's Compensation Act began to run from such date. The reason this case comes under the Workmen's Compensation Act is because Idaho's act covers both accidental injuries and occupational diseases.

In both the case of *Agostin vs. Pittsburgh Steel Foundry Corp.*, 47 Atl. (2nd) 680, 354 Pa. 543, and in *Stewart vs. Lakey Foundry & Machine Co.*, 18 N. W. (2nd) 895, 311 Mich. 463, it was held that the right to compensation for disability from exposure to silica dust commenced when the employee quit working and that was the date of his total disability.

We are willing to admit that the 60-day or the 90-day limitation periods provided by the terms of Section 42-1a-49, appear to be somewhat inadequate in certain circumstances. We do not know why the Legislature provided a limitation period of one year within which an employee might file a claim with the Industrial Commission based upon silicosis and in the same section of the Law provided only a 60-day limitation period in cases such as that of Mr. Lunnen's and a 90-day period in claims involving disability from exposure to benzol or its derivitives. Regardless of what reasons the Legislature had in providing those particular limitation periods for

those particular types of cases, we are bound by the Legislative enactment. There probably are several provisions of the Occupational Disease Law which the Legislature should amend and which we would be willing to discuss and recommend before the proper tribunal, namely the Legislature or some of its committees.

Mr. Lunnen's physical and financial condition are such as to merit considerable sympathy and generosity. However, the Supreme Court of Utah many years ago declared that none of the officials charged with the administration of the State Insurance Fund has any legal power or authority to waive the Statute of Limitations or any other valid defense which the Fund may have in a compensation case.

Taslich vs. Industrial Commission, 71 Utah 33, 262 Pac. 281.

Spring Canyon Coal Co. vs. Industrial Commission, 58 Utah 608, 201 Pac. 173.

For the foregoing reasons the award of the Industrial Commission should be annulled.

Respectfully submitted,

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Attorney for Plaintiff.